A

KETUA POLIS NEGARA v. INDIRA GANDHI MUTHO

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ RAHIM JCA
TENGKU MAIMUN JCA
AHMADI ASNAWI JCA

B

[CIVIL APPEAL NO: A-01-365-09-2014]
19 DECEMBER 2014

C

ADMINISTRATIVE LAW: *Remedies – Mandamus – Grant of order of mandamus to compel Inspector General of Police to execute warrant of committal and recovery order – Whether order of mandamus correctly issued – Whether High Court Judge judiciously and properly exercised discretion in making order – Whether parties enforced private right as opposed to public right – Whether enforcement of court processes involving private rights came within scope of public duties - Police Act 1957, ss. 3(3), 20(1) & (3)(f)*

D

CONSTITUTIONAL LAW: *Courts – Jurisdiction – Matters involving custody of children when one spouse converted to Islam – Whether within exclusive jurisdiction of Syariah Court – Whether civil court could make order on custody of children – Whether would result in conflicting decisions*

E

JURISDICTION: *Civil court – Family matters – One spouse in non-Muslim marriage converted to Islam - Whether civil marriage automatically dissolved – Law Reform (Marriage and Divorce) Act 1976, s. 51*

The respondent and one Pathmanathan were married according to the civil law marriage and had three children. Pathmanathan subsequently converted
F to Islam and obtained custody order of all the three children from the Syariah High Court. However, the Syariah Order was not served on the respondent and neither did he take any action to enforce the order. In the meantime, the respondent filed an application in the High Court for custody of the three children under the provisions of Law Reform (Marriage and Divorce) Act
G 1976 ('LRA') and obtained an order to that effect. The respondent served the order on Pathmanathan but the latter failed to comply with the order to surrender the three children to the respondent. The two eldest children have been, all the while, with the respondent. The only child that was with Pathmanathan and for the purpose of the appeal was the youngest child who
H was taken away by Pathmanathan from the respondent without her consent. Because of the failure by Pathmanathan to hand over the child to the respondent, the latter applied and successfully obtained a committal order containing a provision, *inter alia*, requiring the bailiff and a police officer to execute the order against Pathmanathan. The respondent also, at the same time, obtained a recovery order under s. 53 of the Child Act 2001 ('the Child
I Act') directed at the bailiff and a police officer to go to the premises of Pathmanathan to search and take custody of the child. The Inspector General

of Police ('IGP') refused to execute the warrant of committal and the recovery order despite several letters being written for the same, on the ground that the police have been put in a quandary as they are faced with two conflicting court orders, *ie*, the Syariah Court granting custody to Pathmanathan and the High Court order granting custody to the respondent. The IGP took the position that to execute the custody order of the High Court would cause him to be in contempt of the Syariah Court. Hence, the respondent filed an application in the High Court for judicial review, for a *mandamus* to be issued to compel the IGP to execute both the warrant of committal and the recovery order. The application was granted by the High Court and hence, the appeal by the IGP. The sole issue before the court was whether the order of *mandamus* was correctly issued and whether the High Court Judge had judiciously and properly exercised his discretion in making the order, an order of *mandamus* being a prerogative order.

Held (allowing appeal; discharging order of *mandamus* on ground of public policy)

Per Abdul Aziz Rahim JCA (majority):

(1) It is trite law that an order of *mandamus* is issued whenever there is a public duty imposed in law on a person or body and the purpose of the order was to compel that person or body to carry out the duty required by law to be performed by him or by it. An order of *mandamus* will be issued to enforce a public duty at law for public good generally. However, an order of *mandamus* being a discretionary order should not be readily issued when the parties, in enforcing private rights, has a remedy available to it. (paras 8, 30 & 31)

(2) A person who wants the Syariah Court or the High Court to make an order in his or her favour bears the burden to satisfy the court that the subject matter of the action is such that it comes exclusively within the jurisdiction of the Syariah Court. Thus, it was for Pathmanathan to show to the High Court that the issue of custody was within the exclusive jurisdiction of the Syariah Court and that the civil High Court could not and should not make any order on the custody of the children as that would be in conflict with the already existing order obtained by Pathmanathan from the Syariah Court. (paras 22 & 23)

(3) Although, from the Islamic point of view, the marriage is automatically dissolved if one of the spouses of the marriage embraces Islam, it is not the case in the civil marriage point of view. It is clear from s. 51(1) of the LRA that civil marriage may be dissolved only on a petition for divorce in the civil court by the spouse that has not converted to Islam. There is no automatic or immediate dissolution of the civil marriage upon conversion to Islam. As there was no petition for dissolution of marriage by the respondent on the ground that Pathmanathan had converted to Islam, the respondent's civil marriage to Pathmanathan is still a valid and subsisting marriage. (paras 23 & 24)

(4) The effect of s. 51 of the LRA is that a non-Muslim wife who has not converted to Islam may, upon the husband's conversion, apply to the civil court for custody, care and maintenance of the children even without filing for the dissolution of the civil marriage. The issue of custody of children of a civil marriage where one party has converted to Islam is not within the exclusive jurisdiction of the Syariah Court. The non-Muslim party to the civil marriage may file an application in the civil court for the custody of the children and the civil court, in appropriate cases, may grant the custody order. The High Court therefore had the jurisdiction to grant the custody order. (paras 25 & 26)

(5) The dispute herein was between two private parties; and what was involved in the dispute was, a private and personal right of one party over the other. Public policy militates against the use of public resources *ie*, the IGP and the police force to enforce the private rights as opposed public rights when the private rights do not affect the public at large. Even if the order of *mandamus* was refused, the respondent was not without remedy. The committal order was already there and the respondent could, with the assistance of the court bailiff, execute the order against Pathmanathan. (paras 29 & 30)

(6) The IGP has discretion in the matter relating to execution of process to enforce a personal and private right as opposed to enforcement of public right. The duty and powers imposed on and given to the police under s. 20(1) and (3)(f) of the Police Act 1957 ('the Act') must be read in the context of the general duty of the police to maintain law and order and preservation of peace and security of Malaysia and prevention of crimes under s. 3(3) of the Act. These are the public duties of the police. Enforcement of court processes involving private rights did not come within the scope of public duties. (para 36)

Per Tengku Maimun JCA (dissenting):

(1) The civil High Court is the court having jurisdiction to deal with the custody of the child born out of a civil marriage. The custody order issued by the High Court was thus a valid order. The committal order and the recovery order which emanated from the custody order were similarly valid orders and therefore, the respondent had the lawful custody of the child. The position of the law does not in any way change the position of the Syariah Court and the civil High Court under art. 121(1A) of the Federal Constitution. (para 56)

(2) Whilst the case commenced as a private dispute in a civil matter, the police was thrust into the dispute by the application of law. The involvement of the police did not relate purely to the rights of the father and the mother, but it related to the administration of justice as a whole. (para 57)

(3) Flowing from s. 20(3)(f) of the Act, which provided for the general duties of the police, it was thus the statutory duty of the police to execute the warrant of committal and the recovery order issued by the High Court. It was not the IGP's position that it was not the duty of the police to execute the warrant of committal and the recovery order or that it is the discretion of the police whether or not to execute the said order. Neither did the IGP assert that respondent had not at any time approach the police for assistance before filing the application for judicial review. (para 52)

(4) The argument that the police ought not to intervene and that the parties should reconcile among themselves, was not sustainable as it would render the provision in s. 53(3)(d) of the Child Act otiose. (para 61)

(5) The trial judge had not erred in his appreciation of the law and the facts in considering whether *mandamus* could be issued and had properly exercised the remedial jurisdiction in granting *mandamus* against the IGP. The trial judge had alluded to ss. 20(3)(f) and 3(3) of the Act. There was thus no appealable error by the trial judge that warranted appellate intervention. (para 63)

(6) The warrant of committal had not been cancelled and the recovery order had not been set aside. The IGP had a clear duty under the law to execute the warrant of committal to apprehend the father (who not only had disobeyed the High Court order but had offended s. 52 of the Child Act) and to give effect to the recovery order. The committal order and the recovery order was the final remedy available to the respondent to recover the child. There was no other avenue that the respondent could resort to. In any event, there was no order from the Syariah Court requiring the police to perform any act or duty as opposed to the warrant of recovery issued by the High Court which was specifically directed to the police. Therefore, the IGP had taken irrelevant considerations and had acted unreasonably in refusing to execute the said order. (paras 67-69)

Bahasa Malaysia *Translation Of Headnotes*

Responden dan seorang bernama Pathmanathan telah berkahwin menurut undang-undang perkahwinan sivil dan mempunyai tiga orang anak. Pathmanathan kemudian menukar agamanya kepada Islam dan memperoleh perintah jagaan ketiga-tiga orang anaknya daripada Mahkamah Tinggi Syariah. Walau bagaimanapun, Perintah Syariah tersebut tidak diserahkan kepada responden dan dia juga tidak mengambil apa-apa tindakan untuk melaksanakan perintah tersebut. Sementara itu, responden memfailkan permohonan di Mahkamah Tinggi bagi perintah jagaan ketiga-tiga anaknya di bawah peruntukan-peruntukan Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('AMU') dan memperoleh perintah terhadapnya. Responden menyerahkan perintah tersebut kepada

A Pathmanathan tetapi Pathmanathan gagal mematuhi perintah untuk menyerahkan ketiga-tiga anak kepada responden. Dua orang anak yang tertua, pada setiap masa, tinggal bersama-sama dengan responden. Satu-satunya anak dengan Pathmanathan dan bagi tujuan rayuan ini adalah anak bongsu yang telah dilarikan oleh Pathmanathan daripada responden tanpa
B kebenarannya. Disebabkan oleh kegagalan Pathmanathan menyerahkan semula anak tersebut kepada responden, responden memohon dan berjaya memperolehi perintah komital yang mengandungi peruntukan, antara lain, meminta bailif dan pegawai polis melaksanakan perintah tersebut terhadap Pathmanathan. Responden juga, pada masa yang sama, memperoleh perintah
C mendapatkan semula di bawah s. 53 Akta Kanak-Kanak 2001 ('Akta Kanak-Kanak') yang diarahkan kepada bailif dan pegawai polis untuk pergi ke premis Pathmanathan untuk mencari dan mengambil jagaan anak tersebut. Ketua Polis Negara ('KPN') enggan melaksanakan waran komital dan perintah mendapatkan semula walaupun beberapa surat ditulis bagi tujuan tersebut, atas alasan bahawa pihak polis berada dalam keadaan kebingungan
D kerana berhadapan dengan dua perintah mahkamah yang bercanggah, iaitu, Mahkamah Syariah memberikan jagaan kepada Pathmanathan dan perintah Mahkamah Tinggi yang memberikan jagaan kepada responden. KPN mengambil kedudukan bahawa pelaksanaan perintah jagaan Mahkamah Tinggi akan menyebabkan dia menghina Mahkamah Syariah. Oleh itu,
E responden memfailkan permohonan di Mahkamah Tinggi untuk semakan kehakiman, agar *mandamus* dikeluarkan untuk memaksa KPN melaksanakan kedua-dua waran komital dan perintah mendapatkan semula. Permohonan tersebut dibenarkan oleh Mahkamah Tinggi dan oleh itu, rayuan oleh KPN. Satu-satunya isu di hadapan mahkamah adalah sama ada perintah *mandamus*
F telah diberikan dengan betul dan sama ada Hakim Mahkamah Tinggi telah melaksanakan budi bicaranya secara kehakiman dan dengan sewajarnya dalam memberikan perintah tersebut, perintah *mandamus* sebagai perintah prerogatif.

G **Diputuskan (membenarkan rayuan; melepaskan perintah *mandamus* atas alasan polisi awam)**
Oleh Abdul Aziz Rahim HMR (majoriti):

(1) Adalah undang-undang matan bahawa perintah *mandamus* dikeluarkan apabila terdapat kewajipan umum dikenakan oleh undang-undang ke atas seseorang atau sesebuah badan dan tujuan perintah tersebut adalah untuk
H memaksa orang atau badan tersebut menjalankan kewajipan yang diperlukan oleh undang-undang untuk melaksanakannya. Suatu perintah *mandamus* akan dikeluarkan untuk pelaksanaan kewajipan umum di sisi undang-undang untuk kebaikan umum secara amnya. Walau bagaimanapun, perintah *mandamus* sebagai perintah yang mengikut budi
I bicara tidak wajar dikeluarkan dengan mudah apabila pihak-pihak, dalam melaksanakan hak persendirian, mempunyai remedi yang sedia ada baginya.

(2) Seseorang yang mahu Mahkamah Syariah atau Mahkamah Tinggi memberikan perintah yang memihak kepadanya mempunyai beban untuk memuaskan mahkamah bahawa subjek perkara tindakan tersebut adalah sedemikian bahawa ia adalah dalam bidang kuasa eksklusif Mahkamah Syariah. Oleh itu, ia adalah bagi Pathmanathan untuk menunjukkan kepada Mahkamah Tinggi bahawa isu jagaan adalah dalam bidang kuasa eksklusif Mahkamah Syariah dan bahawa Mahkamah Tinggi sivil tidak boleh dan tidak wajar membuat apa-apa perintah atas jagaan kanak-kanak kerana ia akan bercanggah dengan perintah sedia ada yang diperolehi oleh Pathmanathan daripada Mahkamah Syariah.

(3) Walaupun, dari sudut pandangan Islam, perkahwinan akan terbubar secara automatik jika salah seorang pasangan bertukar agama kepada Islam, ia bukan kes sedemikian dari sudut pandangan perkahwinan sivil. Adalah jelas daripada s. 51(1) AMU bahawa perkahwinan sivil boleh dibubarkan hanya melalui petisyen untuk perceraian di mahkamah sivil oleh pasangan yang tidak bertukar kepada agama Islam. Tidak ada pembubaran automatik atau segera dalam perkahwinan sivil atas penukaran agama kepada Islam. Oleh sebab tiada petisyen untuk pembubaran perkahwinan tersebut oleh responden atas alasan bahawa Pathmanathan telah menukar agamanya kepada Islam, perkahwinan sivil responden dengan Pathmanathan adalah perkahwinan yang masih sah dan kekal.

(4) Kesan s. 51 LRA adalah bahawa isteri bukan Islam yang tidak menukar agamanya kepada Islam boleh, atas penukaran agama suaminya, memohon kepada mahkamah sivil bagi jagaan dan nafkah kanak-kanak tersebut walaupun tidak memfailkan perintah untuk pembubaran perkahwinan sivil tersebut. Isu jagaan kanak-kanak bagi perkahwinan sivil di mana salah satu pihak telah menukar agama kepada Islam bukan dalam bidang kuasa eksklusif Mahkamah Syariah. Pihak yang bukan Islam kepada perkahwinan sivil boleh memfailkan suatu permohonan di mahkamah sivil untuk jagaan kanak-kanak dan mahkamah sivil, dalam kes-kes yang sewajarnya, boleh memberikan perintah jagaan tersebut. Mahkamah Tinggi, oleh itu, mempunyai bidang kuasa untuk memberikan perintah jagaan.

(5) Pertikaian di sini adalah antara dua pihak persendirian; dan apa yang terlibat dalam pertikaian tersebut adalah hak persendirian dan perseorangan salah satu pihak terhadap yang satu lagi. Polisi awam menghalang penggunaan sumber am iaitu KPN dan pasukan polis untuk melaksanakan hak-hak persendirian berbanding dengan hak-hak awam apabila hak-hak persendirian tidak menjejaskan awam. Walaupun perintah *mandamus* telah ditolak, responden bukan tanpa remedi. Perintah komital telah sedia ada dan responden boleh dengan bantuan bailif mahkamah, melaksanakan perintah tersebut terhadap Pathmanathan.

A **(6)** KPN mempunyai budi bicara dalam perkara berkaitan dengan pelaksanaan proses melaksanakan hak perseorangan dan persendirian berbanding dengan pelaksanaan hak awam. Kewajipan dan kuasa yang dikenakan dan diberikan kepada polis di bawah s. 20(1) dan (3)(f) Akta Polis 1957 ('Akta') perlu dibaca dalam konteks kewajipan am polis
B untuk mengekalkan undang-undang dan perintah dan memelihara keamanan dan keselamatan Malaysia dan menghalang jenayah di bawah s. 3(3) Akta. Ini adalah kewajipan umum pihak polis. Pelaksanaan proses mahakamah berkaitan dengan hak-hak persendirian tidak terangkum dalam skop kewajipan umum tersebut.

C **Oleh Tengku Maimum HMR (menentang):**

(1) Mahkamah Tinggi sivil adalah mahkamah yang mempunyai bidang kuasa untuk berurusan dengan jagaan anak yang dilahirkan hasil daripada perkahwinan sivil. Perintah jagaan yang diberikan oleh Mahkamah Tinggi adalah oleh itu perintah yang sah. Perintah komital
D dan mendapatkan semula yang timbul daripada perintah jagaan juga adalah perintah-perintah yang sah dan oleh itu, responden mempunyai jagaan sah anak tersebut. Kedudukan undang-undang tidak sedikit pun mengubah kedudukan Mahkamah Syariah dan Mahkamah Tinggi sivil di bawah per. 121(1A) Perlembagaan Persekutuan.

E **(2)** Sementara kes tersebut dimulakan sebagai pertikaian persendirian dalam perkara sivil, pihak polis telah terlibat dengan pertikaian tersebut oleh penggunaan undang-undang. Penglibatan pihak polis tidak berkait semata-mata dengan hak-hak bapa dan ibu, tetapi ia berkaitan dengan pentadbiran keadilan secara keseluruhannya.

F **(3)** Berikutan s. 20(3)(f) Akta, yang memperuntukkan kewajipan am kepada pihak polis, ia adalah dengan itu kewajipan statutori pihak polis untuk melaksanakan waran komital dan perintah mendapatkan semula yang dikeluarkan oleh Mahkamah Tinggi. Bukanlah kedudukan KPN bahawa
G ia bukan tugas pihak polis untuk melaksanakan waran komital dan perintah mendapatkan semula atau bahawa ia adalah budi bicara pihak polis sama ada hendak atau tidak melaksanakan perintah tersebut. Juga KPN tidak menyatakan bahawa responden tidak, pada bila-bila masa, meminta bantuan pihak polis sebelum memfailkan permohonan untuk semakan kehakiman.

H **(4)** Hujahan bahawa pihak polis tidak wajar campur tangan dan bahawa pihak-pihak perlu berdamai sesama sendiri, tidak boleh dipertahankan kerana ia akan menjadikan peruntukan dalam s. 53(3)(d) Akta Kanak-Kanak lewah.

I

(5) Hakim bicara tidak khilaf dalam pertimbangan undang-undang dan fakta-faktanya dalam mempertimbangkan sama ada *mandamus* boleh diberikan dan telah melaksanakan bidang kuasa pembetulan dengan sewajarnya dalam memberikan *mandamus* kepada KPN. Hakim bicara telah menyentuh tentang s. 20(3)(f) dan s. 3(3) Akta. Oleh itu, tidak ada kekhilafan oleh hakim bicara yang boleh dirayu yang mewajarkan campur tangan rayuan.

(6) Waran komital tidak dibatalkan dan perintah mendapatkan semula tidak diketepikan. KPN mempunyai kewajipan jelas di bawah undang-undang untuk melaksanakan waran komital untuk menahan Pathmanathan (yang bukan hanya melanggar perintah Mahkamah Tinggi malah telah melanggar s. 52 Akta Kanak-Kanak) dan untuk melaksanakan perintah mendapatkan semula. Perintah komital dan perintah mendapatkan semula adalah remedi terakhir yang ada untuk responden mendapatkan semula anak tersebut. Tidak ada pilihan lain untuk responden meminta pertolongan. Malahan, tidak ada perintah daripada Mahkamah Syariah meminta pihak polis melaksanakan apa-apa tindakan atau tugas berbanding dengan waran untuk mendapatkan semula yang dikeluarkan oleh Mahkamah Tinggi yang secara spesifiknya diarahkan kepada pihak polis. Oleh itu, KPN telah mengambil kira pertimbangan yang tidak relevan dan telah bertindak secara tidak munasabah dalam menolak untuk melaksanakan perintah tersebut.

Case(s) referred to:

Hj Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal [2014] 4 CLJ 253 FC ***(foll)***

Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Myriam Abdullah v. Mohamed Ariff [1971] 2 Sya 1 HC ***(dist)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Regina v. Commissioner of Police of the Metropolis, Ex Parte Blackburn [1968] 2 WLR 893 ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(foll)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

The Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney [1934] 1 AC 365 ***(refd)***

Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34 FC ***(refd)***

Legislation referred to:

Child Act 2001, ss. 52(1), 53(3)(d)
Court of Judicature Act 1964, s. 25(2)
Federal Constitution, art. 121(1A)
Law Reform (Marriage and Divorce) Act 1976, s. 51(1), (2)
Police Act 1967, ss. 3(3), 20(1), (3)(f)
Specific Relief Ordinance 1950, s. 44

A *For the appellant - Suzana Atan; (Shamsul Bolhassan with her); SFC*
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Watching Brief - Andrew Khoo Chin Hock; Bar Council
Philip Koh Tong Ngee; Majlis Perundingan Malaysia Agama Buddha, Kristian, Hindu, Sikh & Taoism
B *Goh Siu Lin; Women's Aid Organisation (WAO) & Ors*

[Appeal from High Court, Ipoh; Judicial Review No: 25-13-06-2014]

Reported by S Barathi

C

JUDGMENT

Abdul Aziz Rahim JCA:

[1] The respondent and one Pathmanathan were married according to the
D civil law marriage. They have three (3) children. Subsequently, on 11 March 2009 Pathmanathan, the husband converted to Islam and became a Muslim. There was a tussle for the custody of the three children. Pathmanathan went to the Syariah High Court Ipoh and obtained an *ex-parte* interim custody order of all the three children on 8 April 2009 and obtained a permanent
E custody order on 29 September 2009. However, Pathmanathan, (the husband) did not serve the Syariah Order on the respondent and neither did he take any action to enforce the order. The Syariah High Court order contains an endorsement for compliance within 14 days of service of the order and non-compliance will amount to contempt of court.

F **[2]** In the meantime, the respondent filed an application in the High Court Ipoh for custody of the three children under the provisions of Law Reform (Marriage and Divorce) Act 1976; and on 11 March 2010 the High Court at Ipoh granted the respondent the custody of the three children. Pathmanathan was a party (he was the respondent) to the application for custody before the
G High Court. The respondent served the order on Pathmanathan but the latter failed to comply with the order to surrender the three children to the respondent.

[3] We were informed by counsel for the respondent that the two eldest children had all the while, even at the time when the Syariah Court made
H the order for custody, were with the respondent. The only child that was with Pathmanathan at the material time and for the purpose of the appeal, is the youngest child (Prasana Diksa – Birth Certificate No. B214511) of the three children that goes by her Muslim name of Umu Habibah ("Habibah"), who was taken away by Pathmanathan from the respondent without her consent
I on 31 March 2009. Because of the failure by Pathmanathan to hand over Habibah to the respondent, the latter applied to, and obtained from, the High Court at Ipoh a committal order against Pathmanathan for failure to comply with the High Court Order of 11 March 2010. The committal order also

contained a provision requiring the bailiff and a police officer to execute the order. At the same time, the respondent also obtained a recovery order under s. 53 of the Child Act 2001 directed at the bailiff and a police officer to go to the premises of Pathmanathan to search and take custody of Habibah. Pathmanathan was also represented at the hearing of the recovery order.

[4] However, no action was taken by the police to execute the two orders namely, the committal order and the recovery order which were both dated 30 May 2012.

[5] It appears from the fact of the case that the Inspector General of Police (IGP) had publicly made a statement (which were widely reported in the printed media in the country) that the police will not take any action to arrest Pathmanathan or to secure the custody of Habibah because of the IGP's perception that there were two conflicting orders as to the custody of the children – the first order was by the Syariah High Court Ipoh dated 29 September 2009 ('the Syariah Order') and the second order was by the High Court at Ipoh dated 11 March 2010 ('the High Court Order').

[6] Consequently, the respondent applied to the High Court at Ipoh for a judicial review for an order of *mandamus* to be issued and directed at the IGP commanding the IGP to execute the two High Court Orders namely, the recovery order and the committal order.

[7] This is an appeal by the IGP against that order of *mandamus* issued by the High Court at Ipoh. The sole issue for our determination is whether the order of *mandamus* was correctly issued and whether the learned High Court judge had judiciously and properly exercised his discretion in making the order, an order of *mandamus* being a prerogative order.

[8] It is trite law that an order of *mandamus* is issued whenever there is a public duty imposed in law on a person or body and the purpose of the order is to compel that person or body to carry out the duty required by law to be performed by him or by it.

[9] At this juncture and before we discuss the merit of the appeal, we will take note of the following facts which are not in dispute: (a) Pathmanathan, the husband, was represented and participated in the application for custody by the respondent in the High Court at Ipoh; (b) in that same proceedings the issue of the existence of the Syariah Order was raised and canvassed; (c) Pathmanathan appealed against that order to the Court of Appeal but the appeal was struck off on technicality, in that Pathmanathan as the appellant had failed to file any appeal record for the appeal; (d) Pathmanathan also filed an appeal against the committal and the recovery orders but again the appeal was dismissed on technical ground for the same reason that the appellant/ Pathmanathan had failed to file any appeal record for the appeal; (e) the IGP had filed an application to intervene in the appeal as to the committal and

recovery orders; but because the main appeal by Pathmanathan was struck off, the IGP's application to intervene accordingly falls; (f) the Syariah Order does have an endorsement but does not contain any direction to the bailiff or a police officer to effect enforcement whereas the High Court Orders contained that direction.

[10] Now, we address the submissions by counsels in this appeal. Learned Senior Federal Counsel Encik Nor Hisham argued that the order of *mandamus* was bad because it was impossible to be enforced due to the presence of two conflicting custody orders ie, the Syariah Order and the High Court Order. He submitted that the learned High Court Judge in granting the custody order on 11 March 2010 had committed a serious error of law in that the learned High Court Judge had ruled that the Syariah Order was invalid and therefore irrelevant for consideration in deciding the application for custody by the respondent. Impliedly therefore the learned Senior Federal Counsel submitted that because the learned High Court Judge had erroneously held that the Syariah Order was invalid, therefore the exercise of discretion to order the issuance of order of *mandamus* was wrong.

[11] Secondly, the learned Senior Federal Counsel also submitted that the matter before us arises from a private dispute between the parties namely, the wife (ie, the respondent) and Pathmanathan (the husband) as to the custody of the three children out of their civil marriage. It was further submitted that though the IGP was not able to challenge the granting of the recovery order and the committal order because the appeal by Pathmanathan ie, the husband was struck off on technicality, the appellant (ie, the IGP) in this appeal can still challenge that validity of the order of *mandamus* in a collateral attack against the custody order by the High Court on two grounds. First, that the recovery order was made beyond the scope of s. 53 of the Child Act 2001 and secondly the existence of the Syariah Order which is an order by a court of competent jurisdiction.

[12] For the respondent it was submitted that firstly, there was no conflicting court orders. The Syariah Court is not a court of parallel jurisdiction with the civil High Court; but a court of exclusive jurisdiction in that its jurisdiction is exclusively applicable to Muslim and practising the precepts of Islam. The civil High Court jurisdiction however covers all – Muslim and non-Muslim – except when it comes to matters relating to the practice and teaching of Islam. Secondly, it was submitted that the children in this case are children begotten out of a civil marriage between two non-Muslims under the civil Law Reform (Marriage and Divorce) Act of 1976 and therefore any issue as to the custody of the children can be dealt with by the civil High Court. Thirdly, the respondent being a non-Muslim cannot go to the Syariah Court to get custody of the children because the Syariah Court has no jurisdiction over her. The respondent however can go to the civil High Court for custody of her children from the marriage with

Pathmanathan. Though Pathmanathan had embraced Islam and is now a Muslim, it does not prevent him from submitting to the jurisdiction of the civil High Court. In fact the civil High Court always has jurisdiction over him on the matter because the children were the children of civil marriage. On the contrary, the respondent, being non-Muslim has no obligation to submit herself to the Syariah Court jurisdiction for the purpose of obtaining the custody of her children. It was submitted before us that even if the respondent were to agree to submit herself to jurisdiction of the Syariah Court, in law the consent of party does not confer jurisdiction on the Syariah Court to try the matter when the Syariah Court does not have the jurisdiction in the first place. Fourthly, if the order of *mandamus* is not granted the respondent, being a non-Muslim, will have no remedy in so far as it relates to the custody of her children and that she as a mother will forever be condemned to never see her children again (in this case her daughter Habibah). The non-granting of the order of *mandamus* would also mean that the recalcitrant ex-husband (Pathmanathan) will remain in contempt of court and continue to commit an offence under s. 52(1) of the Child Act 2001.

Our Opinion

[13] It is pertinent to take note that in this appeal all parties agreed that on principle an order of *mandamus* can be issued against the IGP in an appropriate case and with proper exercise of the judicial discretion by the court. Nevertheless, we would reiterate that the civil High Court had the powers to grant prerogative writs including a writ of *mandamus*. This is provided for under sub-s. 25(2) of the Court of Judicature Act 1964 in relation to additional powers of the High Court. This provision had been interpreted by the Federal Court in the case of *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641 as well as in other cases by the Apex Court: *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 LNS 34; [1982] 1 MLJ 260, *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145. The gist of these decisions by the Apex Court is that the civil court may resort to the additional powers given to it under the Schedule to the Court of Judicature Act 1964 to found the necessary jurisdiction and to issue appropriate orders in the appropriate case in order to do justice. In the case of *The Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney* [1934] 1 AC 365 at p. 395, it was said that the order of *mandamus* "was introduced to prevent disorder from a failure of justice and defect of police; and that it ought to be used upon all occasions where the law had established no specific remedy, and where in justice and good governance that ought to be one". In *Regina v. Commissioner of Police of the Metropolis, Ex Parte Blackburn* [1968] 2 WLR 893, the English Court of Appeal as a matter of principle agreed that a *mandamus* can be issued to the Commissioner of Police to reverse his policy decision of not prosecuting gaming clubs for

breaking gaming laws. Salmon LJ, one of the law Lords who delivered the judgment in that case said that "the police owe the public a clear legal duty to enforce the law" and that "in the extremely unlikely event of the police failing or refusing to carry out their duty, the court would not be powerless to intervene".

[14] Section 20(1) and (3) of the Police Act 1967 ("the Act") read together with s. 3(3) of the Act empowers and imposes a duty on a police officer to maintain law and order and to apprehend and prosecute offenders. And under s. 20(3)(f) of the Act, a police officer is under a duty to execute summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority. For ease of reference the relevant provisions of the Police Act are reproduce below:

Section 3(3):

> (3) The Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence.

Section 20 (1) and (3) and subsection (3) (f):

> (1) Every police officer shall perform such duties and exercise such powers as are by law imposed or conferred upon a police officer, and shall obey all lawful directions in respect of the execution of his office which he may from time to time receive from his superior officers in the Force.
>
> ...
>
> (3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in section 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including –
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) ...
>
> (f) executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority.

[15] Reading the above provisions we have no doubt in our mind that the IGP being the officer in charge of the police and its most superior commander may be directed by a competent authority to carry out the duty

imposed on a police under his command as envisaged under the Police Act, in particular the above provisions which we have referred to. In law therefore, where there is a legal public duty to do an act by an authority, then an order of *mandamus* may be issued against that authority to carry out that public duty if such authority has refused to do so.

[16] However, the appellant in this appeal had mounted a collateral attack against the High Court Orders to justify its claim that the order of *mandamus* in this case was issued on a wrong exercise of discretion. The appellant argued that the High Court should not have issued the order of *mandamus* to enforce the High Court Order on custody and recovery of the children because there is a valid Syariah Order granted to Pathmanathan and that by granting the order of *mandamus* to the respondent, the High Court had placed the IGP in a dilemma. The appellant argued that the Syariah Order and the High Court Order are in conflict with each other. Is that so?

[17] To resolve the perceived or purported conflict between the Syariah Order and the High Court Orders, we have to take a step back and examine the jurisdiction of the Syariah Court and the civil High Court.

[18] The starting point is art. 121(1A) of the Federal Constitution. That Article provides that the High Courts (one in Malaya and one Sabah and Sarawak) which were established pursuant to art. 121(1) of the Constitution shall not have jurisdiction in respect of any matter within the jurisdiction of the Syariah Court. Mr Phillip Koh, who was watching brief for Malaysian Consultative Council for Buddhism, Christianity, Hinduism, Sikhism and Taoism when invited to address the court on the point of jurisdiction as *amicus curiae* informed the court that art. 121(1A) was introduced into the Constitution to overcome the problem of conflicting decision between the Syariah Court and the High Court in the case of *Myriam Abdullah v. Mohamed Ariff* [1971] 2 Sya 1; [1971] 1 MLJ 265. That case also involved custody of children. The husband in that case had obtained by consent from the Kathi Court the custody of the children of their Islamic marriage. Later the wife filed another application for custody of the children in the High Court. The High Court in that case granted the custody to the wife. Both parties in that case were Muslims. So there were two conflicting orders for custody of the children involving two Muslims in Islamic marriage. Thus following the amendment to the Constitution and the insertion of art. 121(1A) the civil High Court does not have jurisdiction to deal with matters that fall within the jurisdiction of the Syariah Court. In this regard Mr Phillip Koh informed the court that matters that come within the jurisdiction of Syariah are listed in the Ninth Schedule – List II – The State List of the Constitution. Among the matters listed are: matters on Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy and guardianship. However one must

bear in mind that the jurisdiction on these matters conferred on the Syariah Court are only applicable to Muslims. In other words the jurisdiction of the Syariah on these matters does not extend to non-Muslim. This principle has been decided by high authorities and our law reports are replete with cases on point.

[19] We observe in the State List – List II – Ninth Schedule to the Constitution, the matter of custody of children is not expressly stated. One however may argue that matters on marriage, divorce and guardianship mentioned in the list are wide enough to include matters as to custody of children because there are closely linked. We can accept that. But are they exclusively within the jurisdiction of the Syariah Court? There are provisions in the Infant Guardianship Act 1961 and the Law Reform (Marriage and Divorce) Act of 1976 that govern issues as to custody of children out of valid marriage though applicable only to non-Muslim.

[20] In *Hj Raimi Abdullah v. Siti Hasnah Vangarama Abdullah & Another Appeal* [2014] 4 CLJ 253; [2014] 3 MLJ 757, the Federal Court speaking through the judgment of Arifin Zakaria CJ in construing the scope of art. 121(1A) of the Constitution did not disapprove the view expressed by the Court Of Appeal in that case that:

> In our view the correct position in law is that only if the subject matter of the action is exclusively within the jurisdiction of the syariah courts would the subject matter, by virtue of Article 121(1A) of the federal constitution, fall outside the jurisdiction of the civil court." – page 767 of the report.

[21] The Federal Court also quoted with approval the following passage from the judgment of the Court Of Appeal in *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481; [1999] 1 MLJ 266:

> Article 121(1A) of the FC does not exclude the jurisdiction of the ordinary courts over all matters – including offences under the PC committed by Muslims – which are also within the jurisdiction of the syariah court. It only removes the jurisdiction of the ordinary courts over those matters which are within the exclusive jurisdiction of the syariah court. The intention of the legislature, as could be discerned from Hansard, was to prevent the High Court from exercising judicial review over the decision of the Syariah Court.

[22] The emphasis is on the phrase "exclusive jurisdiction"; and the Federal Court also did not reject the view by the Court of Appeal that the burden is on the person (who wants the Syariah Court or the High Court to make an order in his or her favour) to satisfy the court that the subject matter of the action is such that it comes exclusively within the jurisdiction of the Syariah Court. In *Hj Raimi*'s case (*supra*), the respondent's (the plaintiff) father had converted to Islam together with his wife and five children

including the plaintiff who at the time of conversion was an infant in 1983. Sixteen years later in 2009 the plaintiff commenced an action against the defendants in the High Court in Penang *inter alia* for declarations and orders that the defendants had wrongfully and unlawfully subjected the plaintiff to undergo a religious conversion process at the age of seven years old. The defendants in that case filed an application to strike out the plaintiff's action but on appeal to the Court of Appeal by the plaintiff in that case, the appeal was allowed. The Court of Appeal directed that the plaintiff's originating summons be converted to writ and the matter be reverted to High Court Penang to be tried on the issue whether the subject matter of the plaintiff's action fell within the exclusive jurisdiction of the Penang Syariah High Court. The defendant appealed against that decision to the Federal Court and the latter allowed the appeal, ruling that the Syariah Court have exclusive jurisdiction to determine whether a person is a Muslim or not. That is, the matter is exclusively within the jurisdiction of the Syariah Court as envisaged in the State List – List II - Ninth Schedule of the Federal Constitution.

[23] Applying the above principle, we are of the view that it is for Pathmanathan (the husband and respondent before the High Court in the custody proceedings filed by the respondent here) to show to the High Court that the issue of custody is within the exclusive jurisdiction of the Syariah Court and that the civil High Court could not and should not make any order on the custody of the children as that would be in conflict with the already existing order obtained by Pathmanathan (the husband and the father) from the Syariah High Court. The High Court that granted the custody order to the respondent apparently did not agree with Pathmanathan. We think the learned judge is correct. In matters of custody involving non-Muslim married couple whose marriage was dissolved on ground of conversion to Islam, the Syariah Court does not have exclusive jurisdiction. At this point we wish to state that from the Islamic point of view if one of the spouse of the marriage embraces Islam the marriage is automatically dissolved. This is because Islam forbids a Muslim to marry a non-Muslim unless the non-Muslim first be converted to Islam except where, if the non-Muslim is a woman, the woman is ahlil Kitab. But from the civil marriage point of view, the conversion to Islam does not automatically dissolve the civil marriage registered under the Law Reform (Marriage And Divorce) Act of 1976. The dissolution of the civil marriage may be dissolved only on a petition for divorce in the civil court by the spouse that has not converted to Islam. This position is clear from the reading of s. 51(1) of the Law Reform (Marriage and Divorce) Act 1976 which provides as follows:

> 51(1) Where one party to a marriage has converted to Islam, the other party who has not so converted may petition for divorce.

[24] Thus there is no automatic or immediate dissolution of the civil marriage upon conversion to Islam. It is also pertinent to look at s. 51(2) of the Law Reform (Marriage and Divorce) Act 1976 which reads:

A 51(2) The court upon dissolving the marriage may make provision for the wife or husband, and for the support, care and custody of the children of marriage, if any, and may attach any conditions to the decree of the dissolution as it thinks fit.

In our present case, there is no petition for dissolution of marriage by the B respondent on the ground that Pathmanathan had converted to Islam. Therefore, in so far as the respondent is concerned her civil marriage to Pathmanathan is still a valid marriage and still subsists.

[25] In our view, the effect of s. 51 of the Law Reform (Marriage And Divorce) Act 1976 is that a non-Muslim wife who has not converted to C Islam, may upon the husband's conversion apply to the civil court for custody, care and maintenance of the children even without filing for the dissolution of the civil marriage. That being the case the issue of custody of children of a civil marriage where one party has converted to Islam is not within the exclusive jurisdiction of the Syariah Court. The non-Muslim party D to the civil marriage may file an application in the civil court for the custody of the children and the civil court in appropriate cases may grant the custody order.

[26] We therefore conclude that the High Court has jurisdiction to grant the custody order in this case. As authority to support our conclusion on this E point we refer to the Federal Court decision in *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1.

[27] However, in this appeal we are not asked to decide whether the High Court orders were valid or otherwise or that the Syariah Order was null and void. That had been done by the High Court when it granted the order of F custody and recovery to the respondent. These issues are raised by the appellant as a side wind to challenge the order of *mandamus* issued by the High Court. They are raised not for our decision. To put the issues to rest, we need only to cite the Federal Court decision in *Subashini Rajasingam* (*supra*) where it was held that the civil High Court has exclusive jurisdiction G on the dissolution of civil marriage and matters consequential or ancillary thereto, including maintenance, custody of children and other ancillary matters. They are not within the Syariah Court jurisdiction. Hence, it was held in that case that it was an abuse of process for the husband to file custody proceedings in the Syariah Court in respect of the children because the H Syariah Court have no jurisdiction in the matter of custody of children of non-Muslim marriage.

[28] The principal question however, is whether the order of *mandamus* ought to be given in this case. We recapitulate that on 30 May 2014 the learned Justice Lee Swee Seng of the High Court at Ipoh had found the I husband Pathmanathan guilty of contempt of the two High Court Orders – the custody and the recovery order and had passed sentence of imprisonment until the contemnor ie, the husband Pathmanathan has purged his contempt.

Counsel for Pathmanathan then had applied for the stay of the committal order but was refused. The respondent now can enforce the order with the assistance of the court bailiff to have the contemnor apprehended.

[29] In this respect, the learned senior federal counsel for the appellant submitted that the dispute is between two private parties; and what is involved in the dispute is, a private and personal right of one party over the other. Therefore, we think that public policy militates against the use of public resources ie, the IGP and the police force to enforce the private rights as opposed a public rights when the private rights do not affect the public at large.

[30] The general principle is that an order of *mandamus* will be issued to enforce a public duty at law for public good generally. Of course here, one may argue that if the order of *mandamus* is refused, the respondent is without remedy and that the husband Pathmanathan may just ignore the High Court Order with impunity. However we think that even if the order of *mandamus* is refused the respondent is not without remedy. The committal order is already there; and the respondent could with the assistance of the court bailiff execute the order against the husband.

[31] An order of *mandamus* being a discretionary order should not be readily issued when the parties in enforcing a private rights, has a remedy available to it – in this case the committal order.

[32] In *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56; [1972] 1 MLJ 180, the applicant for a *mandamus* order was the defendant in a Civil Suit No. 168 of 1971 at Ipoh High Court which is a suit where the plaintiff claim for damages arising from an accident involving an infant. The applicant had applied to the surgeon who was the respondent in the application for detail of injuries found on the infant and the treatment given at the hospital after the request for the information was not complied with by the respondent's surgeon. The respondent in the applicant was the doctor who attended to the infant and had ordered the amputation of the infant's leg above the knee. This application was made pursuant to s. 44 of the Specific Relief Ordinance 1950. In the application the applicant alleged that the injuries which the infant actually received were not such that should have necessitated the amputation of the leg provided proper care was exercised by the respondent in charge at the Ipoh Hospital, the inference being that it was the negligence of the respondent which aggravated the injuries. In *Koon Hoi Chow* (*supra*), the learned Sharma J said that "for the applicant to succeed in bringing his case within the purview of s. 44 of the Specific Relief Ordinance, the applicant must show a personal rights which would be injured or defeated if the order is not made". In that case the learned counsel for the applicant conceded that the personal rights of the applicant was in truth and substance the right to effectively defend the civil suit. The learned judge held the view that such rights is against the plaintiff in the suit and not against the respondent in the application.

[33] It is also pertinent to note that in *Koon Hoi Chow* (*supra*) the learned judge also remarked that *mandamus* does not lie to enforce a civil liability arising out of a contract or to enforce rights based on contract and also that *mandamus* does not issue to enforce a civil liability under torts. But more importantly the learned judge said that "the applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent".

[34] In *Ex Parte Blackburn* (*supra*) a private citizen had applied to the court for *inter alia*, an order of *mandamus* directing the respondent to reverse a policy decision. The policy decision was that the respondent as Commissioner of Police of Metropolis will not allow an insight observation in license or registered club for the purpose of detecting gaming without first obtaining his covering approval. In that case Lord Denning MR said that "*mandamus* is a very wide remedy which has always been available against public officers to see that they do their public duty". However, the learned law Lord also said that "the parties who apply for *mandamus* must show that he has sufficient interest to be protected and there is no other equally convenient remedy". Once it is shown the remedy of *mandamus* is available even against the Commissioner of Police of Metropolis. In his judgment Lord Denning MR had stated that "it is an open question whether Mr Blackburn has a sufficient interest to be protected". His Lordship went further to say that "no doubt any person who was adversely affected by the action of the Commissioner in making a mistaken a policy decision would have such interest". The difficulty is, according to the His Lordship is to see how Mr Blackburn himself has been affected. That question was left open and unanswered. But His Lordship went on to hold that "the policy was unfortunate". In our view the facts and circumstances in the *Ex Parte Blackburn* (*supra*) are very different from the present appeal. In that case it involved the question of enforcing a law on gaming and it would be in the public interest for the Police Commissioner to put gaming under control according to the provision of the law. But what we want to emphasise is that *Ex Parte Blackburn* (*supra*) may be cited as an authority to show that an applicant for an order of *mandamus* must show sufficient public interest that goes beyond the applicant's personal or private interest. The other law Lord in that case, the learned Edmund Davies LJ said as follows:

> It was further urged that, assuming jurisdiction in this court and even assuming that the respondent is under the duty which this court now unanimously holds he does own, nevertheless the applicant should be denied the relief sought inasmuch as it is open to him to lay an information or apply for a voluntary bill of indictment. The law is, as I believe, that relief by way of a prerogative order will not be granted if there is available any other legal remedy, equally convenient, beneficial and appropriate.

In this respect, and as we have said earlier, the respondent has the remedy of executing the committal order granted by the High Court.

[35] With regard to the approach that the court should take in dealing with an application for *mandamus*, we can do no better than to quote from a passage by Lord Wright in the House of Lords's case of *The Mayor, Aldermen and Councillors of the Metropolitan Borough of Stepney* (*supra*) at p. 395:

> I do not wish in any way to detract from the seriousness of the duties with which the Court is charged in dealing with an application for a writ of *mandamus*, or the importance of the Court giving the most liberal consideration in the interests of the applicant. In the words of Lord Mansfield in *Rex v. Barker* (1), "A *mandamus* is a prerogative writ; to the aid of which the subject is entitled, upon a proper case previously shown, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. Within the last century, it has been liberally interposed for the benefit of the subject and advancement of injustice". More compendiously it was said by Bowen LJ in *In re Nathan* (2) "If, therefore, there is no other means of obtaining justice, the writ of *mandamus* is granted to enable justice to be done". Thus the judges have a wide discretion in exercising this remedial jurisdiction; but it is to be exercised as a judicial discretion. There are in the books a vast number of cases illustrating the rules which govern the exercise of this power. Some of these cases are difficult to reconcile with others. I shall merely seek by a few citations to justify the principles which I think should govern this case.

[36] We are also of the view that IGP has a discretion in the matter when it comes to execution of process to enforce a personal and private right as oppose to enforcement of public right. In our view the duty and powers imposed on and given to the police under s. 20(1) and (3)(f) of the Police Act 1957 must be read in the context of the general duty of the police to maintain law and order and preservation of peace and security of Malaysia and prevention of crimes under s. 3(3) of the same Act. These are the public duties of the police. Enforcement of court processes involving private rights does not come within this scope of public duties.

[37] On the above reasoning and in the light of the facts and circumstances of this case, we are of the view that the exercise of discretion by the learned judge ought to be interfered with and the order of *mandamus* be discharged on the ground of public policy.

[38] My learned brother Justice Ahmadi had read this judgment in draft and had agreed with it. But my learned sister Justice Tengku Maimun is dissenting. Accordingly, by majority we allow the appeal. In view of the fact that this is a case of public interest we make no order as to cost.

A **Tengku Maimun JCA:**

[39] This court, by a majority decision had allowed the appeal of the Inspector General of Police ('the IGP') against an order of *mandamus* issued by the High Court. I dissented. I now give the reasons for my dissenting judgment.

B **Background Facts**

[40] The respondent and one Pathmanathan were married under the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform Act'). They have three (3) children.

C **[41]** In 2009, Pathmanathan ('the father') converted into Islam. The three children; Tevi Darsiny, Karan Dinish and Prasana Diksa who were 12 years, 11 years and one year old respectively were converted by the father as well. The father obtained a custody order for all the three children from the Syariah Court. For obvious reason, that the Syariah Court has no jurisdiction D over the non-Muslim respondent ('the mother'), the mother was not made a party to the proceedings in the Syariah Court.

[42] In 2010, the mother filed an application in the High Court Ipoh for custody of the three children under the Law Reform Act. The High Court granted the mother the custody of the three children, who at all material E time, were with the mother (except the youngest daughter, Prasana Diksa). Prasana Diksa ('the child') was barely a year old and was still breast feeding when she was forcibly taken away from the mother in March 2009. The High Court ordered the father to deliver the child to the mother immediately. The father refused to comply with the High Court order.

F **[43]** The father had filed an appeal against the custody order but he failed to diligently pursue his appeal, resulting in the appeal being struck out by the Court of Appeal.

[44] Upon the father's failure to comply with the custody order, the High G Court found him to be in contempt and committed him to prison. A warrant of committal, commanding every police officer to apprehend the father and convey him to prison was issued by the High Court. A recovery order under the Child Act 2001 was also issued by the High Court. The recovery order specifically directed the police to investigate and determine the whereabouts H of the father and the child and to obtain custody of the child from any place where she may be found. Insofar as the recovery order is concerned, it must be noted that no affidavit was filed by the father to oppose the mother's application.

[45] The father had also appealed against the committal and recovery I orders, which appeal had similarly been struck out by the Court of Appeal. Consequent to the striking out of the appeal, the Attorney General's application to intervene on his own behalf and on behalf of the IGP in the proceedings in the Court of Appeal was rendered academic.

[46] The warrant, the order for committal and the recovery order were served on the IGP. The solicitors for the mother had written several letters to the IGP on the orders. The IGP refused to execute the warrant of committal and the recovery order on the ground that the police have been put in a quandary as they are faced with two conflicting court orders, ie, the Syariah Court order granting custody to the father and the High Court order granting custody to the mother. The IGP took the position that to execute the custody order of the High Court would cause him to be in contempt of the Syariah Court.

[47] Unable to trace and be reunited with the child, the mother filed an application in the High Court for judicial review, for a *mandamus* to be issued to compel the IGP to execute both the warrant of committal and the recovery order. The application was granted by the High Court.

The Appeal

[48] In challenging the High Court's decision, learned Senior Federal Counsel ('SFC') repeated the stand that the IGP is unable to enforce the committal order and the recovery order because at the same time, the Syariah Court custody order is still in force which entitles the father to custody of the three children including the child.

[49] Learned SFC had also submitted that:

(i) under art. 121(1A) of the Federal Constitution, Syariah Court and Civil High Court are courts of equal standing with its own exclusive jurisdiction which one may not encroach into another;

(ii) the *mandamus* order was erroneous and the exercise of discretion by the learned High Court Judge was tainted with illegality. In this respect the complaint of learned SFC was on the finding of the High Court that (p. 24: Rekod Rayuan Tambahan Perayu 2): "This court had held that the custody order of the Syariah Court is null and void and of no effect and the Syariah Court had no jurisdiction over the granting of the said custody order".

(iii) this is a dispute between private parties which does not concern public law issue where parties should have reconciled between themselves; and

(iv) under s. 52 of the Child Act 2001, the father is also considered a lawful guardian of the child.

[50] To reiterate, the issue before the Court of Appeal is whether the order of *mandamus* was correctly granted by the High Court. The correctness of the decision of the High Court on the custody order, the committal order and the recovery order is no longer an issue after the father's appeal was struck out.

[51] Coming back to the points raised on art. 121(1A) of the Federal Constitution; on the finding by the High Court that the Syariah Court order was null and void and that the Syariah Court has no jurisdiction to grant the custody order and on the point that the father is also the lawful guardian of the child, the answer is found in the case of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1, where the facts are very much similar to the present case.

[52] In *Subashini* (*supra*), the parties were originally Hindus and were married pursuant to a civil ceremony of marriage registered under the Law Reform Act. There were two children of the marriage, both boys. The husband converted himself and the elder son, aged four at the material time, to Islam. An interim custody order was granted by the Syariah Court in respect of the converted son to the husband. After the husband's conversion and knowing that the husband had taken proceedings in the Syariah Court, the wife filed a petition for the dissolution of marriage pursuant to s. 51 of the Law Reform Act, coupled with an application for custody and ancillary reliefs.

[53] *Subashini*'s case went up to the Federal Court. Among the questions posed for determination by the Federal Court was:

> In situations where one spouse in a marriage under the Law Reform (Marriage and Divorce) Act 1976 (a "Law Reform Marriage") converts to Islam and the other does not, does the High Court or Syariah Court have exclusive jurisdiction to grant decrees of divorce of such Law Reform Marriages and to make all other orders in respect of the division of matrimonial assets, the maintenance of spouse and of the children of the Law Reform Marriage ("children of the Law Reform Marriage"), the custody, care and control of the children of the Law Reform Marriage and all other matters incidental thereto.

[54] The Federal Court, speaking through Nik Hashim FCJ said at p. 28 of the report:

> [15] ... my view is that the High Court would have the jurisdiction to hear and determine the petition for divorce and the application for ancillary reliefs under s. 51 of the 1976 Act even though the husband had converted to Islam before her petition for divorce had been filed in the High Court and that he had already commenced the proceedings in the Syariah Court. ...

[55] The learned FCJ further said at p. 31:

> [19] ... The husband could not shield himself behind the freedom of religion clause under art. 11(1) of the FC to avoid his antecedent obligations under the 1976 Act on the ground that the civil court has no jurisdiction over him. It must be noted that both the husband and wife were Hindus at the time of their marriage. Therefore the status of the husband and the wife at the time of registering their marriage was of

material importance, otherwise the husband's conversion would cause injustice to the unconverted wife including the children. A non-Muslim marriage does not automatically dissolve upon one of the parties converted to Islam. Thus by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect to divorce and custody of the children of the marriage, and thus, the civil court continues to have jurisdiction over him, notwithstanding his conversion to Islam.

[56] By the above judgment, it is now settled that the Civil High Court is the court having jurisdiction to deal with the custody of the child born out of a civil marriage. The custody order issued by the High Court is thus a valid order. The committal order and the recovery order which emanate from the custody order are similarly valid orders. The mother has the lawful custody of the child. And this position of the law does not in any way change the position of the Syariah Court and the Civil High Court under art. 121(1A) of the Federal Constitution.

[57] With regards the third point raised by learned SFC, my views are as follows. Whilst the present case commence as a private dispute in a civil matter, the police is now thrust into the dispute by the application of the law. The involvement of the police does not relate purely to the rights of the father and the mother, but it relates to the administration of justice as a whole.

[58] One of the general duties of the police as provided under s. 20(3)(f) of the Police Act 1967 is to execute summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority. Flowing from section 20(3)(f), it is thus the statutory duty of the police to execute the warrant of committal and the recovery order issued by the High Court. Indeed, it is not the IGP's position that it is not the duty of the police to execute the warrant of committal and the recovery order or that it is the discretion of the police whether or not to execute the said orders. Neither did the IGP assert that the mother had not at any time approached the police for assistance before filing the application for judicial review. The challenge by the IGP is premised on the existence of the Syariah Court order and that the recovery order is beyond the scope of s. 53 of the Child Act, as the father is also considered the lawful guardian.

[59] Parliament in its wisdom had enacted ss. 52 and 53 of the Child Act. Section 52(1) provides:

(1) Any parent or guardian who –

(a) does not have the lawful custody of a child; and

(b) takes or sends out a child, whether within or outside Malaysia,

without the consent of the person who has the lawful custody of the child commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[60] Section 53 provides for recovery order and it states:

> 53.(1) If it appears to the Court that there is reason to believe that a child had been taken or sent away without the consent of the person who has lawful custody of the child ... the Court may make a recovery order.
>
> (2) A recovery order may be made by the Court on application being made by or on behalf of any person who has the lawful custody of the child.
>
> (3) For the purposes of this section, a "recovery order" may –
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) authorize any police officer to enter into any premises specified in the order and search for the child, using reasonable force if necessary.

[61] The argument that the police ought not to intervene and that the parties should reconcile among themselves, in my view, is not sustainable as it will render the provision in s. 53(3)(d) of the Child Act otiose.

[62] The law relating to the granting of an order of *mandamus* is settled. *Mandamus* lies to secure the performance of a public duty in which an applicant has sufficient legal interest to the performance. In *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56; [1972] 1 MLJ 180 the requirement to be satisfied by the applicant is stated thus:

> The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the respondent.

[63] I find that the learned trial judge had not erred in his appreciation of the law or the facts in considering whether *mandamus* could be issued. In my judgment, the learned judge had properly exercised the remedial jurisdiction in granting *mandamus* against the IGP. The learned judge had alluded to s. 20(3)(f) and to s. 3(3) of the Police Act. Section 3(3) provides:

> (3) The (Police) Force shall subject to this Act be employed in and throughout Malaysia (including the territorial waters thereof) for the maintenance of law and order, the preservation of the peace and security of Malaysia, the prevention and detection of crime, **the apprehension and prosecution of offenders** and the collection of security intelligence. (emphasis added)

[64] Having considered the relevant provisions in the Police Act, His Lordship made reference to the case of *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748 where the Court of Appeal states at p. 765:

> An inferior decision making authority, whether exercising a quasi-judicial function or purely an administrative function has no jurisdiction to commit an error of law. ...
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong questions or takes into account irrelevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review ...

[65] The learned judge then made the following finding:

> The IGP was labouring under the misconception that there were 2 conflicting orders; one from the Syariah Court giving custody of the youngest child to the father and another order from the Civil High Court giving custody to the mother. Whilst that may be so, there is no order of recovery issued by the Syariah Court requiring the police to search for the child and to recover the child. That is obvious as the child is for all intents and purposes with the father.
>
> There is also no contempt order taken out by the father of the child from the Syariah Court as the mother is not in contempt of Court. However there is a recovery order issued by the Civil High Court as well as the warrant of committal against the father of the child. Thus whilst there is no order for the police to execute from the Syariah Court, there are 2 orders for the police to execute issued by the Civil High Court which is the recovery order and the warrant of committal.
>
> ...
>
> There are thus only the 2 Civil High Court orders for enforcement. The IGP then cannot refuse enforcement of the Civil High Court orders as that would be a dereliction of his duty under the Police Act. Only the police is empowered to enforce a warrant of committal and not layman or any other persons. So too the recovery order for under the Child Act 2001 where the resources of the State may be employed to trace and recover a child pursuant to an order issued by the Court.
>
> If his declared intention as admitted by him is that he would not execute the Civil High Court orders, then an order in *mandamus* shall be issued to compel him to act in accordance with the law.

A The IGP further erred in law when he laboured under the misapprehension that he may be subject to the contempt action if he had refused to execute the custody order of the Syariah Court or if he had proceeded to execute the 2 orders of the Civil High Court. To begin with there is no custody order for him to execute from the Syariah Court as there is no recovery order nor a committal order.

B

[66] The learned judge further said:

The High Court being a superior court established under the Federal Constitution and on which the judicial powers of the Federation are vested, does not act in vain. The orders issued by it cannot be disregarded with impunity and breach of it would give rise to enforcement C proceedings, the most serious of which would be contempt of court. ...

Article 126 of the Constitution states that "... a High Court shall have power to punish any contempt of itself". Section 13 of the CJA states that "... the High Court shall have power to punish any contempt of itself".

D Paragraph 10 to the Schedule (read with section 25(2) of the CJA) confirms that the High Court has the "power to enforce a judgment of the Court in any other manner which may be prescribed by any written law or rules of court".

...

E A refusal to execute a warrant of committal which expressly called on the police to apprehend the contemnor and to escort him to the prison, in this case in Tapah, and there to be detained and kept in safe custody, would be to challenge the authority of an order issued by a superior Court as provided for under Article 121 of the Federal Constitution. It would be to denude the High Court Order and Warrant of Committal of meaning F and effect such that it is toothless not worth more than the paper it is written on.

I agree with learned counsel for the Applicant that such a decision frustrates the Judicial Power of the Federation by rendering the court's power to order the enforcement of the Custody Order, through committal G proceedings, ineffective and illusory. The decision is a gross misapprehension of the established fact that the High Court, at all times, commands the power to order the enforcement and execution of its judgments and orders. The decision is therefore tainted with an error of law and unreasonable in the circumstances of the case. The decision cannot be sustained and must yield to a *mandamus* order.

H

[67] I agree with the above finding of the learned judge. And keeping in mind the Federal Court judgment in *Subashini* (*supra*), I find that there is no appealable error committed by the learned judge that warrants appellate intervention.

I **[68]** It cannot be denied that the mother has a legal right to the child. Her right is not doubtful nor is it a qualified one. The right had been determined by the High Court. The warrant of committal had not been cancelled and the

recovery order had not been set aside. The IGP has a clear duty under the law to execute the warrant of committal to apprehend the father (who not only had disobeyed the High Court order but had offended s. 52 of the Child Act) and to give effect to the recovery order. The committal order and the recovery order is the final remedy available to the mother to recover the child. There is no other avenue that the mother could resort to.

[69] It must be emphasised that quite apart from the fact that the orders issued by the High Court are valid orders, as found by the learned judge, there is no order from the Syariah Court requiring the police to perform any act or duty as opposed to the warrant of committal and recovery issue issued by the High Court which are specifically directed to the police. Based on the above facts, I find that the IGP had taken irrelevant consideration and had acted unreasonably in refusing to execute the said orders.

[70] In the circumstances of the present case, I am satisfied that *mandamus* should be granted to enable justice to be done. I therefore dismiss the appeal with no order as to costs.